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No. 84-363

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,
against
THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,
and
BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION,
HARTFORD NATIONAL CORPORATION,
THE COMMONWEALTH OF MASSACHUSETTS,
THE STATE OF CONNECTICUT AND
BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NEW YORK STATE BANKERS ASSOCIATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE FOR THE NEW YORK STATE BANKERS ASSOCIATION

The New York State Bankers Association respectfully requests permission to file the attached brief *amicus curiae* in support of petitioners.

STATEMENT OF INTEREST

The New York State Bankers Association (the "Association") is the largest trade association for the commer-

cial banking industry in the State of New York. The Association represents 152 banking organizations comprising ninety-four percent of the commercial banks in the state. The membership of the Association includes banks of every size located in all parts of the state, from a few large banks such as petitioner Citicorp to many small, local banks. Ninety percent of the members of the Association are smaller than any of the respondent bank holding companies.

The Connecticut and Massachusetts statutes at issue in this case injure the members of the Association by permitting bank holding companies in each of those states to acquire banks in the other state, while preventing New York bank holding companies—even New York bank holding companies which have banking subsidiaries in other New England states—from acquiring banks in Connecticut and Massachusetts. They also restrict the ability of bank holding companies in Connecticut and Massachusetts to engage in interstate commerce by acquiring New York banks. These discriminatory statutes injure not only large banks located in New York City, but also smaller New York banks located throughout the state, particularly those near Connecticut and Massachusetts.

Moreover, these statutes are part of a rapid, alarming trend toward regional banking systems. None of the regional systems being developed permits acquisitions by New York bank holding companies. Bank holding companies located in states which participate in such a regional banking system are similarly prohibited from acquiring New York banks. This regional balkanization of banking poses a serious threat to all of the Association's members.

ISSUES TO BE PRESENTED

The attached brief *amicus curiae* has two purposes. First, this brief describes how the Connecticut and Massachusetts statutes at issue in this case injure all New

York banks and bank holding companies. Petitioner Citicorp, the only New York petitioner, is not in a position to describe this pervasive, state-wide injury from its own experience. Second, this brief presents an analysis of the constitutional questions raised by the statutes which differs from that which petitioners presented in their Petition for *Certiorari* and will presumably present in their briefs on the merits.

STATEMENT OF CONSENT OR OBJECTION

Counsel for the Association have contacted counsel for all parties of record to seek their consent to the filing by the Association of this brief *amicus curiae*. Counsel for all parties other than the State of Connecticut indicated that they would be willing to give such consent. Because of Connecticut's objection, the Association was unable to obtain unanimous consent.

WHEREFORE, for the reasons set forth above, the Association requests that the Court grant this motion to file the attached brief *amicus curiae* in support of petitioners.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THE CONNECTICUT AND MASSACHUSETTS STATUTES VIOLATE THE COMMERCE CLAUSE	7
A. The Douglas Amendment Was Not Intended To Abrogate The Commerce Clause As It Applies To State Statutes Permitting Interstate Banking Acquisitions	8
B. There Is Certainly No Unmistakably Clear Congressional Authorization Of These State Statutes	12
C. The State Interest In Local Control Of Banking Recognized By The Douglas Amendment Cannot Justify These Statutes	14
II. THE CONNECTICUT AND MASSACHUSETTS STATUTES VIOLATE THE COMPACT CLAUSE	19
CONCLUSION	21

TABLE OF AUTHORITIES

Cases: Page

Bacchus Imports, Ltd. v. Dias, 104 S. Ct. 3049 (1984) 16, 18
California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 18
City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 14
Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) 17
Florida v. Georgia, 58 U.S. (17 How.) 478 (1855) 20
Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976) 16
Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) 18
Hughes v. Oklahoma, 441 U.S. 322 (1979) 16, 17
Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) ..... *passim*
New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) 12, 13
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 15
Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838) 20
South-Central Timber Development, Inc. v. Wunnicke, 104 S. Ct. 2237 (1984) 12, 13, 16
Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) ..... *passim*
United States Steel Corp. v. Multistate Tax Commission, 434 U.S. 452 (1978) 19, 20
Western & Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648 (1981) 9, 16

Constitutional and Statutory Provisions:

U.S. Const. art. I, § 8, cl. 3 (Commerce Clause) ..... *passim*
U.S. Const. art. I, § 10, cl. 3 (Compact Clause) ..... *passim*
U.S. Const. art. IV, § 2, cl. 1 (Privileges and Immunities Clause) 16
U.S. Const. amend. XXI 18
12 U.S.C.A. § 1823(f) (West Supp. 1984) 8, 10

TABLE OF AUTHORITIES—Continued

page

12 U.S.C.A. §§ 1841-1850 (West 1980 & Supp. 1984) (Bank Holding Company Act) ..... *passim*
15 U.S.C. §§ 1011-1015 (1982) (McCarran-Ferguson Act) 9
Conn. Act. 83-411 (Reg. Sess.) ..... *passim*
Mass. Gen. Laws Ann. ch. 167A, § 2 ..... *passim*

Other Authorities:

102 Cong. Rec. (1956) 12
Conn. Senate Debate (May 18, 1983) 3
Control of Bank Holding Companies: Hearings on S. 880, S. 2350 and H.R. 6227 Before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess. (1955) 11
The Federalist Papers, Nos. 7 & 42 (Rossiter ed. 1961) 16
Federal Reserve Board Staff Opinion (Oct. 11, 1979) 16
H.R. Rep. No. 609, 84th Cong., 1st Sess. (1955) 11
Massachusetts House Committee on Banks and Banking Research Staff Summary (Nov. 9, 1982) 3
N.Y. Times, Apr. 3, 1983 3

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BRIEF AMICUS CURIAE OF THE NEW YORK STATE BANKERS ASSOCIATION

INTEREST OF AMICUS CURIAE

The New York State Bankers Association (the "Association") is the largest trade association for the commercial banking industry in the State of New York. Its membership includes 152 banking organizations of every size and geographic location in New York, comprising ninety-four percent of the commercial banks in the state. Over

ninety percent of the Association's members have assets below $5 billion. Some are centered in New York City, while others are centered in small cities and towns throughout the state.

This case involves the constitutionality of statutes enacted by the states of Connecticut [1] and Massachusetts [2] authorizing out-of-state bank holding companies to acquire banks in those state only if they are headquartered in specific "New England" states. The dispute arose when respondents Bank of Boston Corporation and Bank of New England Corporation, both Massachusetts bank holding companies, sought to acquire bank holding companies located in Connecticut, and when respondent Hartford National Corporation, a Connecticut bank holding company, sought to acquire a Massachusetts bank holding company. Applications for approval of the proposed acquisitions were submitted to the Federal Reserve Board ("the Board"), which has authority over the transactions pursuant to the Bank Holding Company Act ("BHCA"), 12 U.S.C.A. §§ 1841-1850 (West 1980 & Supp. 1984). Although the Board expressed doubt as to the constitutional validity of the Connecticut and Massachusetts statutes, it approved the applications because it was unable to conclude that the state statutes were "clear[ly] and unequivocal[ly]" unconstitutional. (Pet. App. A41, A74-A75). The orders of the Board approving the acquisitions were affirmed by the Second Circuit.[3] This Court granted *certiorari* on January 7, 1985.

The statutes under review are of great importance to the Association's members. Many of the Association's members consider all or part of Connecticut and Massa-

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[1] 1983 Conn. Act 83-411 (Reg. Sess.) (Appendix to Petition for Writ of *Certiorari* ("Pet. App.") A97-A100).

[2] Mass. Gen. Laws Ann. ch. 167A, § 2 (West 1971 & Supp. 1984) (Pet. App. A101-A102).

[3] 740 F.2d 203 (2d Cir. 1984) (Pet. App. A21-A33).

chusetts (as well as other New England states) to be within their service areas. A number of member banking organizations maintain non-bank subsidiaries in Connecticut, Massachusetts and other New England states, which compete with New England banking organizations with respect to certain financial services. Other Association members have already obtained banks in Maine, which freely allows entry by banks from other states. Furthermore, many members are geographically located close to Connecticut or Massachusetts, with which New York shares extensive borders. In many cases, these banks would be natural partners for nearby Connecticut or Massachusetts banks. Thus, the members of the Association are vitally interested in having the same opportunity as other out-of-state competitors to engage in banking in the New England area.

The interests of these members in equal competition are adversely affected by the regionally discriminatory Connecticut and Massachusetts statutes here at issue. Those statutes are part of a purposeful attempt to create an exclusive New England banking region by allowing bank holding companies from specified New England states freely to acquire banks within the region, while prohibiting New York bank holding companies and banks from acquiring, or being acquired by, New England banks and bank holding companies (the "New England Compact").[4]

If this discriminatory scheme were allowed to stand, all New York banks, whether large or small, would be pro-

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[4] The history of the two acts makes clear that the intent of the legislation is to exclude outside banks, especially the money center banks headquartered in New York, from being able to compete with New England banks within the region. *See, e.g.*, N.Y. Times, Apr. 3, 1983, § 3, at 4, col. 3 (statement of Massachusetts State Senator Brennan) (Pet. App. A189-A190); Massachusetts House Committee on Banks and Banking Research Staff Summary (Nov. 9, 1982) (Pet. App. A150-A152); Conn. Senate Debate (Mar. 26, 1983) (statement of Connecticut State Senator Sullivan) (Pet. App. A159).

hibited in each state in the region from competing on equal terms with banks headquartered anywhere in New England.[5] For example, New York banking institutions that currently provide financial services in Massachusetts and Connecticut through non-bank subsidiaries would have to compete on a disadvantaged basis with large banking organizations located in other New England states that could provide customers with full banking services in addition to the financial services that the New York banking institutions could offer. Similarly, New York banks located near the border of Connecticut or Massachusetts would be unable to combine with banks located in neighboring communities in those states in order to better serve local needs, although those Connecticut or Massachusetts banks could combine with banks located far away in other New England states.

The Connecticut and Massachusetts statutes would also restrain banks in the New England region from engaging in interstate commerce outside of the region by acquiring New York banks, thereby denying the benefits which such acquisitions could offer to New York banks and their communities. The definition in the Connecticut Act of "New England bank holding company" requires, *inter alia*, that all of the company's subsidiaries have their principal places of business in New England. The statutory penalty applicable to a New England bank holding company that acquires a New York bank or bank holding company is immediate divestiture of all direct or indirect ownership interests in any Connecticut bank or bank holding company. The Massachusetts statute is similar, albeit somewhat less restrictive. Under that act, a New England bank holding company would be penalized for acquiring a

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[5] The Connecticut and Massachusetts statutes even prohibit indirect competition in those states by a New York bank. Under each of those statutes, a bank holding company located in Maine, for example, would be disqualified from the benefits of the statutes if it were directly or indirectly owned or controlled by a New York bank or bank holding company.

bank outside the region if such acquisition resulted in a shifting of its principal place of business outside of the region.

The adverse effect which the New England Compact would have upon New York banking institutions threatens significant injury to the economy of the State of New York. In 1983, financial services accounted for the employment of 686,400 persons in New York, with 241,200 persons being employed directly in banks. As the State of New York noted at pages 2-3 of its *Amicus Curiae* Brief in Support of the Petition for *Certiorari*, "financial services—and particularly banking—are to New York as corn is to Kansas, coal to West Virginia, oil and cattle to Texas."

Moreover, the effects of the New England Compact cannot be viewed in isolation. Other regional banking centers are presently being created, and the impetus for such regional centers will undoubtedly increase if this Court upholds the Connecticut and Massachusetts statutes. The Board has itself remarked on the growing trend toward regionalization of banking:

> The regional interstate banking system developing in New England raises issues of considerable importance because no fewer than 15 state legislatures are considering proposals that, if enacted, would create regional banking systems in every part of the country. The Georgia legislature has already passed a regional interstate banking statute, and there are proposals for regional banking systems in the Southeast (Florida and Georgia and a combination of other states as far north as Virginia), the Northwest (Washington, Oregon and Idaho), the Mid-Atlantic (New Jersey, Pennsylvania and several other states as far south as Virginia) and the Mid-West (several different regional groupings under discussion). Both the increasing number of states considering such proposals and the progress of the proposed legislation toward enactment suggest that, should the New Eng-

> land interstate banking zone be upheld, a system of regional zones may develop involving major areas of the nation.

(Pet. App. A37-A38) (footnote omitted). As described at page 11 of the Petition for Writ of *Certiorari*, this movement toward sectionalism has progressed even further since the above statement was made by the Board.

The trend toward regionalization will have especially harsh effects on banking institutions located in the State of New York, which is wholly excluded from each of the regional banking centers now under consideration. The proposed Mid-Atlantic region would include several states, such as New Jersey and Pennsylvania, that are contiguous to New York and within the natural service area of many New York banks. The formation of such a Mid-Atlantic region, combined with the New England Compact, would result in New York being excluded from the interstate competition permitted in all regions adjoining the state. In essence, New York is being made the target of concerted banking boycotts designed to isolate New York banking institutions from the rest of the banking community.

SUMMARY OF ARGUMENT

The Connecticut and Massachusetts statutes at issue are in plain violation of the Commerce Clause, unless they are authorized by the Douglas Amendment to the BHCA. The Douglas Amendment establishes a federal principle of state-by-state banking, but authorizes each state to permit entry by out-of-state bank holding companies. There is no indication in the language of the Douglas Amendment or its legislative history that this provision was intended to renounce federal interest in interstate banking. Instead, the BHCA and the prior opinions of this Court indicate that any state statute which permits out-of-state banking organizations to acquire banks within the state must do so within the bound-

aries of the Commerce Clause. Certainly, neither the Douglas Amendment nor its legislative history meets this Court's requirement of an unmistakably clear congressional authorization to the contrary. The legitimate state interest in local control of banking institutions, which is recognized by the Douglas Amendment, cannot justify discriminatory statutes establishing special commercial relations among certain states to the exclusion of others.

The Connecticut and Massachusetts statutes also run afoul of the Compact Clause. The statutes were enacted as part of a regional agreement that adversely affects the federal structure by aggrandizing the power of states within the region, to the detriment of excluded states. The agreement therefore requires the assent of Congress, which has not been granted.

ARGUMENT

I. THE CONNECTICUT AND MASSACHUSETTS STATUTES VIOLATE THE COMMERCE CLAUSE

As the court below and the Board recognized, and as respondents effectively concede,[6] the Connecticut and Massachusetts statutes plainly violate the Commerce Clause of the United States Constitution[7] unless they have been authorized by act of Congress. Respondents claim to find the necessary congressional authorization in section 3(d) of the BHCA, 12 U.S.C.A. § 1842(d) (West Supp. 1984), commonly referred to as the Douglas Amendment. In essence, the Douglas Amendment precludes the Board from approving the acquisition of a bank by any out-of-state bank holding company, unless a

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[6] None of the respondents has asserted that the statutes could be upheld absent the approval of Congress. Instead, they argue that such discriminatory statutes are authorized by federal statute.

[7] U.S. Const. art. I, § 8, cl. 3.

statute in the state where the bank is located authorizes such an acquisition. It thus recognizes the legitimacy of each state's interest in local control of banking institutions in that state. However, the Douglas Amendment does not renounce federal interest in interstate banking, or otherwise abrogate the Commerce Clause as it applies to state statutes permitting interstate banking acquisitions. Rather, the state's legitimate interest in local control of banking institutions must be considered in determining whether a particular statute is unreasonable under the Commerce Clause. The Connecticut and Massachusetts statutes are unreasonable in that they discriminate on the basis of state-of-origin and are not closely tailored to legitimate state interests.

A. The Douglas Amendment Was Not Intended To Abrogate The Commerce Clause As It Applies To State Statutes Permitting Interstate Banking Acquisitions

Under the BHCA, the approval of the Board is required before a bank holding company can acquire any bank. Section 3(d) of the BHCA, the Douglas Amendment, states that the Board may not approve the acquisition by a bank holding company of a bank located in another state, unless the statutory law of the state in which the bank is located permits such acquisition.[8] As the Board has noted, the Douglas Amendment does not on its face authorize the states to restrict interstate commerce.[9] Instead, as this Court explained in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980):

> The language of the statute establishes a general federal prohibition on the acquisition or expansion

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[8] The Board may also approve the interstate acquisition of a failing bank pursuant to 12 U.S.C.A. § 1823(f) (West Supp. 1984). *See infra* pp. 10-11.

[9] (Pet. App. A65) ("the Douglas Amendment does not appear *on its face* to authorize discrimination") (emphasis in original).

> of banking subsidiaries across state lines. The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited.

Id. at 47 (emphasis in original). Indeed, the Court stated in *Lewis* that "it is doubtful that § 3(d) authorizes state restrictions of any nature on bank holding company activities." *Id.*[10]

Thus, the language of the Douglas Amendment does no more than empower the states to make it possible for the Board to approve interstate banking acquisitions. While it recognizes the legitimate state interest in local control of banking institutions, it does not authorize the states to regulate interstate commerce in ways that are unreasonable and therefore violate the Commerce Clause.[11] This interpretation of section 3(d) is confirmed by this Court's explanation in *Lewis* of section 7 of the BHCA, 12 U.S.C. § 1846 (1982).[12] The Court recognized that,

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[10] *Lewis* dealt with the expansion of non-bank subsidiaries of bank holding companies across state lines, while the statutes here at issue deal with the acquisition of bank subsidiaries by bank holding companies; properly construed, they do in fact attempt to regulate the activities of bank holding companies. Under the Connecticut statute, for example, a New England bank holding company that owns a Connecticut bank may not acquire a New York State bank without divesting its ownership interest in the Connecticut bank.

[11] In contrast, when Congress has intended to abrogate the Commerce Clause, it has done so clearly and explicitly, as in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1982). *See, e.g., Western & S. Life Ins. Co. v. State Bd. of Equalization,* 451 U.S. 648, 653-55 (1981).

[12] Section 7 provides:

> The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

"[i]n contrast to § 3(d), § 7 of the Act does reserve to the States a general power to enact regulations applicable to bank holding companies." 447 U.S. at 48. Nevertheless, the Court found that section 7 was intended to permit only "state legislation that operates within the boundaries marked by the Commerce Clause." *Id.* at 49. Since section 7 preserves state regulation of bank holding companies even if more restrictive than federal law, but only if it is consistent with the Commerce Clause, the more limited, permissive authority granted to the states by section 3(d) can hardly be construed as congressional authorization to ignore the Commerce Clause.[13] *Cf. Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 959-60 (1982) (congressional deference to state water laws and interstate water compacts does not remove such laws from scrutiny under the Commerce Clause).

There is no merit to respondents' claim that Congress has renounced all interest in interstate banking. In fact, the Douglas Amendment is itself an expression of federal interest. It adopts the federal principle[14] that interstate acquisitions are forbidden unless permitted by individual states. More recently, in the Garn-St Germain Depository Institutions Act of 1982, Congress demonstrated the continuing federal interest in interstate acquisitions by providing authority to federal banking regulators to arrange acquisitions of failing or failed banks by out-of-state bank holding companies.[15] In authorizing such interstate acquisitions, Congress stated no preference for acquisitions by bank holding companies in contiguous or regional

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[13] The limited nature of section 3(d) is further supported by the context of the statute in which it appears. The focus of section 3 is on the powers, responsibilities and limitations of the Federal Reserve Board, not the states. It is section 7 which was intended to address the issue of state authority. Moreover, section 7 was enacted at the same time as section 3(d), and the two should therefore be construed *in pari materia*.

[14] *See Lewis*, 447 U.S. at 47.

[15] *See* 12 U.S.C.A. § 1823(f) (West Supp. 1984).

areas over acquisitions by bank holding companies located elsewhere.

The very limited legislative history of the Douglas Amendment also fails to support respondents' claims that Congress intended to grant the states *carte blanche* to form sectional alliances and create multi-state banking regions. Nothing in this legislative history suggests that Congress intended to empower a state to exercise its authority to permit interstate expansion by discriminating among out-of-state banks based on their state of origin, much less to band together with other states in an exclusive banking region that boycotts other states. Indeed, as the Board recognized, the legislative history demonstrates "no discussion of the power of the states to discriminate among potential out-of-state entrants." (Pet. App. A66) (footnote omitted).

Moreover, at the time when Congress adopted the Douglas Amendment, it had before it proposals to create regional banking areas.[16] None of these proposals was adopted. There is no reason to believe that Congress, without saying a word, would have passed a statute with the intent to allow the states to organize just the types of regional centers that Congress had decided not to create.[17]

Respondents primarily rest their claim of unlimited discretion on the single statement by Senator Douglas

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[16] *See Control of Bank Holding Companies: Hearings on S. 880, S. 2350 and H.R. 6227 before a Subcomm. of the Senate Comm. on Banking and Currency*, 84th Cong., 1st Sess. 140 (1955) (Pet. App. A120-A121); H.R. Rep. No. 609, 84th Cong., 1st Sess. 2-3 (1955) (Pet. App. A132-A133).

[17] This is particularly true in light of the dangers that such regional enclaves pose to individual states that might be excluded—New York's precise fate under the Connecticut and Massachusetts statutes. If Congress had intended there to be regional banking centers it would have set them up itself in a reasonable manner; it would not have left individual states to the whim and mercy of other states.

that his amendment would "permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them." 102 Cong. Rec. 6858 (1956). This Court has frequently stated that "[r]eliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and 'a step to be taken cautiously.'" *New England Power Co. v. New Hampshire*, 455 U.S. 331, 342 (1982) (citation omitted). In any event, there is nothing in this statement which indicates that the Commerce Clause would not apply if and when states acted to permit expansion. A more reasonable reading is that Senator Douglas simply meant that out-of-state bank holding companies would only be able to acquire banks in states which permitted interstate acquisitions, subject to any reasonable regulations that such states might impose consistent with the Commerce Clause. *Cf. Sporhase*, 458 U.S. at 958-60; *Lewis*, 447 U.S. at 49 (federal deference applies only to valid state laws).

Finally, respondents' position lacks common sense. Congress, which has consistently demonstrated in its antitrust laws strong concern over combinations in restraint of trade, would not have silently sanctioned a law under which a group of states could collectively and intentionally boycott another state.

B. There Is Certainly No Unmistakably Clear Congressional Authorization Of These State Statutes

In *South-Central Timber Development, Inc. v. Wunnicke*, 104 S. Ct. 2237 (1984), this Court invalidated under the Commerce Clause an Alaska requirement restricting the export of certain timber taken from state lands. In holding that the state restriction was not authorized by a parallel federal policy regarding timber from federal lands in Alaska, the Court reaffirmed the principle that state regulations which would otherwise violate the Commerce Clause may be upheld only if Con-

gress has affirmatively expressed its intent to authorize such state regulation in a way that is "unmistakably clear." *Id.* at 2242. *See also Sporhase*, 458 U.S. at 960 (noting that congressional consent to state regulation of interstate commerce has been found only where such "intent and policy" had been "expressly stated"); *New England Power Co.*, 455 U.S. at 343. Such an unmistakably clear expression of intent must demonstrate that "Congress affirmatively contemplated otherwise invalid state legislation." *Wunnicke*, 104 S. Ct. at 2242.

The requirement of unmistakable affirmative authorization was stated by the Court in *Wunnicke* to be necessary to effectuate the policies underlying the Commerce Clause. 104 S. Ct. at 2242. As the Court explained:

> Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. . . . On the other hand, when Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be affected by restraints on commerce.

Id. at 2243 (footnote omitted). Accordingly, the Court held that it is not sufficient authorization that the state action be found "in harmony" with federal policy. *Id.* at 2242.[18] Here, the discriminatory statutes, which attempt to set up a regional banking center, are not even

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[18] In expanding upon this holding, the Court explained that "[t]he fact that the state policy in this case appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent." *Id.* at 2243.

in harmony with the federal policy of individual state banking units.

Indeed, the Connecticut and Massachusetts statutes exemplify the grave dangers to the federal system that the requirement of unmistakable affirmative authorization by Congress was intended to prevent. Whether (and, if so, how) the nation should be divided into banking regions is a delicate and important task; it should not be found to have been delegated to the several states without the most explicit affirmative statement of congressional intent. Every available indication of congressional intent suggests that Congress expected the states to operate within the boundaries of the Commerce Clause in exercising their authority under section 3(d) of the BHCA. In any event, there is certainly no "unmistakably clear" affirmative authorization to the contrary.[19]

C. The State Interest in Local Control Of Banking Recognized By The Douglas Amendment Cannot Justify These Statutes

In most cases involving parochial state regulations that protect local commercial interests by discriminating against out-of-state competitors, this Court has applied a rule of *per se* invalidity. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Here, however, the Douglas Amendment forbids entry by out-of-state bank holding companies into any individual state absent permission from that state. As a result, a balancing test may be the more appropriate standard for determining whether the Connecticut and Massachusetts statutes unreasonably affect interstate commerce and are thus outside the scope of state legislative action which Congress intended to sanction by the Douglas Amendment.

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[19] Indeed, the Board itself concluded that the "general" language of the Douglas Amendment "does not appear to meet the stringent test of explicitness laid down by the Supreme Court." (Pet. App. A65).

The basic principles that apply under the balancing test were set forth by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142 (citation omitted). *See Lewis*, 447 U.S. at 36-37 (quoting *Pike* test). In addition, consideration must be given to the legitimate interest, recognized by the Douglas Amendment, in retention by each state of local control over banking institutions within the state. *Cf. Sporhase*, 458 U.S. at 954-58 (strong state interest in preservation of scarce water supplies a factor to be considered in Commerce Clause analysis). Even when this interest is weighed in the balance, however, the Connecticut and Massachusetts statutes clearly cannot survive constitutional scrutiny.

First, the two statutes are not evenhanded. Although the Douglas Amendment allows a state to continue to refuse entry to all out-of-state banks, these statutes discriminate among the various states by permitting or prohibiting interstate acquisitions based solely on whether the out-of-state banking institution is principally located in a favored or excluded state.[20] The principle that states should not discriminate by selecting among states is sufficiently important that it has been embodied in the

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[20] In contrast, a non-discriminatory reciprocal statute, such as that enacted by New York, is evenhanded in that any state can share in the benefits simply by enacting reciprocal legislation.

Privileges and Immunities Clause of the United States Constitution.[21] Moreover, the Connecticut and Massachusetts statutes are part of a concerted effort among a group of states to create a regional banking area and to boycott New York banks.[22] It was the destructive effects of just such sectionalism and "economic balkanization" which the Commerce Clause was intended to prevent. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3058 (1984); *Wunnicke*, 104 S. Ct. at 2242; *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976);[23] *The Federalist Papers*, No. 7, at 62-63 (A. Hamilton), No. 42, at 267-68 (J. Madison) (Rossiter ed. 1961).

It is not sufficient to say that Congress has created economic balkanization by sanctioning a dual banking system and adopting the Douglas Amendment in the first place. A congressional policy judgment in favor of prohibiting interstate banking but allowing states to permit it is not the same as a policy judgment allowing any number of states, acting in combination, to "regionalize"

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[21] U.S. Const. art. IV, § 2, cl. 1. Although the Privileges and Immunities Clause does not apply to corporations, *see, e.g., Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 656 (1981), the Massachusetts and Connecticut statutes, whose definitions of "bank holding company" are coterminous with that of the BHCA, would, under traditional regulatory principles, apply to individual citizens acting in concert pursuant to private contractual arrangements. *See, e.g.*, Board Staff Opinion, Oct. 11, 1979, *reprinted in* 1 Fed. Reserve Regulatory Serv. § 4-425.

[22] The special dangers posed by combinations and agreements in restraint of trade have been well recognized in our antitrust laws, and this Court has noted that antitrust concepts may be useful in applying Commerce Clause principles. *Wunnicke*, 104 S. Ct. at 2246.

[23] As the Court noted in *Cottrell*, discriminatory legislation can "open 'the door . . . to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.'" *Id.* (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935)).

banking without benefit of any congressional approval—much less "unmistakably clear" approval—of the scheme.

Second, there is no "close fit" between these state statutes and the asserted legitimate state interest in preserving local control of banking institutions.[24] *See, e.g., Sporhase*, 458 U.S. at 957; *Hughes v. Oklahoma*, 441 U.S. at 336; *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). For example, the Connecticut statute would allow a bank located in another New England state, perhaps hundreds of miles away, to acquire a Connecticut bank, but would not allow a Connecticut bank located on the New York border to merge with a nearby New York bank serving the same community.[25] And even if it were assumed that Connecticut and Massachusetts each have a legitimate interest in protecting local banks against acquisition by large out-of-state bank holding companies, the statutes at issue are patently overbroad. Over ninety percent of the Association's members are smaller in size than any of the respondent bank holding companies. Yet these smaller banks are excluded from acquiring banks in either Connecticut or Massachusetts, while larger banks in either of those states may freely acquire a bank in the other state.[26]

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[24] The Board concluded in this respect that "the disparate treatment of non-New England bank holding companies does not appear to be justified 'as an incidental burden necessitated by legitimate local concerns.'" (Pet. App. A60) (quoting *Lewis*, 447 U.S. at 42).

[25] Even if it were assumed that Connecticut and Massachusetts had a legitimate interest in encouraging acquisitions by bank holding companies located in states with a demonstrable interest in the welfare and growth of the New England region, the statutes at issue are overbroad in their exclusion of even New England bank holding companies from further expansion if they are controlled by non-New England entities.

[26] It is also doubtful that any of the four respondent bank holding companies, the stock of each of which is nationally traded, can really be considered a locally controlled institution.

The Connecticut and Massachusetts state statutes also discriminate among other states by limiting expansion of New England banking organizations only to selected states. *See supra* pp. 4-5. The statute thus restricts the opportunity of New England bank holding companies to engage in interstate acquisitions, except within New England, and restricts the ability of New York banks to be acquired by bank holding companies located in New England.

The whole focus of the Connecticut and Massachusetts statutes is not on domestic concerns, but rather on external affairs—that is, with establishing special commercial relations with certain states to the exclusion of others.[27] These statutes threaten to bring about precisely the type of sectional economic warfare that the Commerce Clause was intended to prevent. As such, they are clearly unconstitutional.

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[27] The Commerce Clause reasoning applied in other areas where particularly strong state interests are at stake confirms the invalidity of these statutes. For example, in cases involving state regulation of alcoholic beverages, where the states are given plenary control pursuant to the Twenty-First Amendment, this Court has harmonized the state's special interest with the policies of the Commerce Clause. *See, e.g., Bacchus Imports*, 104 S. Ct. at 3058; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964). Similarly, in *Sporhase*, the Court gave consideration to the state's special interest in preserving its scarce water resources and to Congress' deference to state water policies, but nevertheless found that the statute violated the Commerce Clause. 458 U.S. at 954-58. As the Court stated in *Midcal Aluminum*, the key to Commerce Clause analysis in such cases is to make a "pragmatic effort to harmonize state and federal powers." 445 U.S. at 109. Under such an analysis, state actions are unlawful when they go beyond what is necessary to protect important state interests and infringe on the policies of the Commerce Clause. As demonstrated above, and as concluded by the Board, *see supra* note 24, the Connecticut and Massachusetts statutes at issue go well beyond the state's legitimate interest in local control of banking institutions and unduly burden interstate commerce.

II. THE CONNECTICUT AND MASSACHUSETTS STATUTES VIOLATE THE COMPACT CLAUSE

The Compact Clause of the United States Constitution,[28] requires states to obtain congressional approval before entering into compacts or agreements. Under this Court's interpretation, *see, e.g., United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978), three issues must be considered in analyzing joint state action under the Compact Clause: (1) whether the joint action constitutes an agreement or compact; (2) whether it is the type of agreement or compact that requires the consent of Congress; and (3) whether Congress has consented. The Connecticut and Massachusetts statutes fail this three-part test.

The history surrounding the Connecticut and Massachusetts statutes leaves no doubt that they were enacted pursuant to a regional understanding that comes within the purview of the Compact Clause. (For a description of the joint efforts made to create a regional banking center, see the Petition for Writ of *Certiorari* at 4-6.) In *United States Steel Corp. v. Multistate Tax Commission*, this Court emphasized that the Compact Clause reaches informal as well as formal agreements, including agreements effected through reciprocal legislation.[29] 434 U.S. at 470-71.

The New England Compact is also of the type that requires the assent of Congress. As this Court stated in *United States Steel*, "[t]he relevant inquiry must be one of impact on our federal structure." 452 U.S. at 471. The New England Compact threatens the federal structure by disturbing relations among the states and promoting sec-

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[28] U.S. Const. art. I, § 10, cl. 3.

[29] This of course would not affect a unilaterally enacted, individual state statute such as that of New York, which was not part of any interstate agreement and merely promises reciprocity to any other state willing to do the same.

tionalism. The effect of the Compact is to allow its members to aggrandize their power at the expense of New York and other excluded states in a way that the Compact members could not achieve without the Compact.[30] Relations between the states are part of the federal structure to be protected by the Compact Clause. *See, e.g., Florida v. Georgia*, 58 U.S. (17 How.) 478, 494 (1855); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838). Here, unlike *United States Steel*, the Compact will "redound to the benefit of [a] particular group of States [and] to the harm of others." 452 U.S. at 477. Indeed, that is its precise intent. This purpose and effect is plainly an affront to our federal structure.

There is no congressional authorization for the New England Compact.[31] As discussed above, the Douglas Amendment was not intended to authorize discriminatory state statutes, much less the formation of alliances among states to create exclusive regional banking enclaves.

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[30] It is no response to state, as did the court below, that Congress can remove such an impediment. If this were relevant, the Compact Clause would be wholly superfluous, since Congress can always negate any state infringement on its sovereignty. The purpose of the Compact Clause was to require congressional assent *before* any such state action could occur.

[31] Indeed, although the issue has been raised in Congress in recent years, supporters of measures that would explicitly sanction exclusive regional banking compacts have been unable to secure their passage.

CONCLUSION

For the reasons set forth above, this Court should reverse the court below and declare the Connecticut and Massachusetts statutes unconstitutional.

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